IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1982

CAPITOL AGGREGATES, INC.,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY
OF LABOR, AND FEDERAL MINE
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-163-PM
Petitioner	:	A.O. No. 41-00010-05001
vs.	:	
	:	Capitol Cement Quarry and Plant
CAPITOL AGGREGATES, INC.	:	
Respondent	:	Docket No. DENV 79-240-PM
	:	A.O. No. 41-01792-05001
	:	Pit and Plant No. 4

DECISION

Appearances: Sandra D. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert W. Wachsmuth, Richard L. Reed, Esqs., San Antonio, Texas, for Respondent.

Before: Administrative Law Judge Charles C. Moore, Jr.

The above cases were remanded to me by order of the Commission dated May 23, 1980, in order to allow the parties to submit posthearing briefs after receiving copies of the transcript of the hearing. Respondent's posthearing brief deals extensively with the question of whether or not the congressional grant of authority in the Federal Mine Safety and Health Act of 1977 was sufficiently broad to confer jurisdiction 1/ over

1/ I am using the term "jurdisdiction" because most of the attorneys and judges have used that term in connection with this problem. Actually "coverage" would be more appropriate because the question is not whether I have jurisdiction over the case but whether a particular mine is covered by the Act. Obviously I have jurisdiction to decide a case brought under the Federal Mine Safety and Health Act, as these cases were, and jurisdiction over the party was obtained when process was served. The effect on interstate commerce is just one of a number of facts that the Government has to prove in order to prevail.

Respondent's operation. It contends in the first place, that it is not a mine subject to the jurisdiction of the Act because its products do not affect interstate commerce and second, that the Secretary failed to submit evidence on this point. Respondent then proceeded to discuss those citations for which penalties were assessed in my decision of April 14, 1980. The Secretary of Labor's brief confined itself to the issue of jurisdiction.

At the time that I denied the motion to dismiss in Docket No. DENV 79-163-PM, the Government had rested and the only actual evidence on the coverage point as distinguished from the usual assumptions, was the following statement in Respondent's answer: "Respondent's sale

of cement is wholly intrastate."

In denying the motion to dismiss, I was in effect ruling that the sale of a mine product in intrastate commerce affected interstate commerce. With respect to Docket No. DENV 79-240-PM which was tried later, it was brought out that the company was a subsidiary of H. B. Zachry and that Respondent sells asphalt to the state of Texas for road building (DENV 79-240-PM, Tr. 55, 57). But in my opinion insofar as DENV 79-163-PM is concerned, the decision must be based on the state of the record at the time the motion was made and denied.

Even though Capitol Aggregates maintains that it is a small producer, that does not preclude it from affecting interstate commerce. In the landmark case of

Wickard v. Filburn, 317 U.S. 111 (1942), a wheat farmer consuming his own wheat was held to affect interstate commerce. Similarly, in Andrus v. Kaskan, et al., C.A. 77-259 (W.D. Pa. 1977) [cited with approval in Marshall v. Kraynak, 457 F. Supp. 907, 910 (W. D. Pa. 1978)], the court held that although the defendant operator sold only 2,000 tons of coal annually to a power company, it affected interstate commerce when its production was combined with the production of all the nation's small privately owned mines. Aggregating the intrastate sales of small producers in order to find a substantial impact on interstate commerce was also used by the court in Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978). To

the same effect, see Fry v. United States, 421 U.S. 542, 547 (1975). But the Act does not require that Respondent's effect on interstate commerce be substantial. Section 803 of the Act (30 U.S.C. §803) subjects every mine, "the products of which enter commerce, or the operations or products of which affect commerce" to its coverage so that any affect on commerce will subject Capitol Aggregates to the Act. The "de minimus" doctrine does not apply to interstate commerce. Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1945).

Also, the Act states that a certain class of activities, i.e., unsafe mine operations, burden commerce, 30 U.S.C. § 801(f). As stated in Bosack above,

"it makes no difference whether a mine sells all of its coal intrastate since the disruption of coal mine activities in itself is what impedes and burdens commerce." 463 F. Supp. at 801. Where the identification of a class by Congress is a reasonable one, the courts are reluctant to disturb that finding. See United States v. Darby, 312 U.S. 100, 115 (1940); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255, 261-262 (1964); and Katzenbach v. McClung, 379 U.S. 294, 303-304, 305 (1964). And "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to exise as trivial individual instances of the class." Perez v. United States, 402 U.S. 146,

154 (1970). Also, the Act, as legislation enacted primarily for the purpose of perserving human life, must be interpreted liberally. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). 2/

For these reasons, I find that Respon-

2/ In my decision of April 14, 1980 (p. 2), 2 FMSHRC 869, 870, I cited Hammer v. Dagenhart, 247 U.S. 251 (1918), for the proposition that Congress has power to regulate instrumentalities of commerce, which it surely does. One page 13 of its brief, Respondent relies on the same case as holding that Congress lacks power to prohibit the interstate transportation of products manufactured by child labor. The holding regarding Congress' lack of power was clearly overruled in United States v. Darby, 312 U.S. 114, 116 (1940), where the court stated:

"The conclusion is inescapable that Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

dent's activities affect interstate commerce, thereby subjecting Respondent to the Act.

In its posthearing brief, Respondent presented agruments concerning those citations for which I assessed penalties in my April 14, 1980, decision. There is nothing in the brief that persuades me that my former opinion should be altered but I do have the following comments.

Citation No. 169697 concerned a failure to post traffic rules at the quarry. I am still of the opinion that one speed limit sign at the entrance to the quarry fails to satisfy the purpose of the standard, which is to periodically remind vehicle drivers of the applicable speed limits and other rules.

Citation No. 169700 was a citation for an undermined coke stockpile. Respondent maintains that the inspector was remiss in failing to conduct a standard "pack test" which would have determined the stockpile's propensity to collapse. In support thereof it cites two OSHA cases; Reliance Universal, Inc., 1975-1976 OSHD 20,027 (1975), and Armor Elevator Company, 1971-1973 OSHD 15,173 (1972). The standard states that stockpile faces shall be trimmed to "prevent hazards to personnel." 30 C.F.R. §56.9-61. It was within the inspector's expertise to determine, based on his visual observation of the stockpile, activities around the stockpile, and the fact that

it was already undermined one foot, that it posed a hazard to personnel in the vicinity. Reliance Universal concerned the failure to test for the presence of flammable vapors which are not observable by the naked eye, and Armor Elevator Company concerned the failure of an inspector to measure the distance and angle of a ladder in order to prove that its position at the time a citation was issued was hazaardous. There is little similarity between those regulations and the regulation before me. My prior finding of violation is reaffirmed.

With respect to Citation No. 169705, inadequate illumination over the coke storage bin, I find Respondent's argument that its maintenance records did not show any malfunction of the lights

unpersuasive and find no reason to disturb my prior finding. If Respondent had produced a witness who saw the light burning the previous night, it might have been a different story.

Citation No. 169706, another illumination violation, is also reaffirmed. In this case, only an electrical outlet was supplied, there were no lights installed in the area aroung the coke crusher and conveyor. I think a hazard would be created rather than allayed were employees required to carry lighting equipment in one hand and repair tools in the other to make repairs in this area at night. Moreover, the standard applies to "all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites" in

addition to work areas. 30 C.F.R. § 56.17-1.

Citation No. 170007 of Docket No. DENV 79-240-PM concerns a malfunctioning backup alarm on a haulage truck. A malfunctioning backup device is as much a violation of the standard as a failure to install any backup warning device in that it fails to promote safety in the fashion specified in the standard. There is no evidence in the record that Respondent regularly inspected the backup alarms on its trucks so that barring any evidence that this is the very first instance in which the backup alarm malfunctioned on this truck, I find that my original assessment in this instance was warranted. The Secretary does not need to prove that Respon-

dent's haul truck is regularly operated in a reverse direction without a backup alarm or the assistance of an observer in order to prove a violation of the standard. The Secretary showed that there was no observer specially appointed to guide the haul truck when backing and that the backup alarm was not operating. Perhaps if the haul truck had no reverse gear I would vacate the citation, but that is not the case here. With respect to the two OSHA cases cited by Respondent, Collier Construction Company, 1973-1974 OSHD 21, 792(1974); and Brown-Johnson Company, 1973-1974 ASHD 21, 832 (1974), those cases are not binding on this forum.

Respondent maintains that the guard-

ing standard violation contained in Citation No. 170010 was an isolated act of employee misconduct and that Respondent should be thereby relieved of liability. But the acts of an employee are imputed to the operator. Ace Drilling Coal Company, 2 FMSHRC 790 (April 24, 1980) PITT 75-1-P, IBMA 76-60; and Jones & Laughlin Steel, 2 FMSHRC 678 (March 11, 1978), PENN 79-145. I was also forced to disregard the testimony of an employee with respect to whether or not the gear was in motion when the doors to the gear housing were opened as he contradicted himself several times. My finding in this instance will remain undisturbed.

My April 14, 1980, decision which was reversed by the Commission and

remanded to me 3/ is hereby reaffirmed and a copy is attached as Appendix I. Respondent is ordered to pay to MSHA within 30 days penalties in the total amount of $215.

3/ After I had issued my decision of Arpil 14, 1980, I learned that although I had received the transcript over two months earlier, the parties had not received copies of the transcript. They had therefore been deprived of the opportunity to submit briefs within 30 days after receipt of the transcript. I attempted to remedy the situation by issuing a stay of my decision, but the Commission ruled that I had no power to stay a decision after issuance. The Commission accomplished the same result, however, by reversing and remanding.

June 24, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. DENV 79-163-PM DENV 79-240-PM
v.	:	
CAPITOL AGGREGATES, INC.	:	

DECISION

This civil penalty case involves the interpretation of 30 CFR §56.17-1, a mandatory illumination standard. In a decision issued on April 14, 1980, the administrative law judge found multiple violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) and assessed penalties. We vacated that decision on procedural grounds, and on remand the judge reaffirmed his prior decision. The operator, Capitol Aggregates, Inc., filed a petition for discretionary re-

view, which we granted in part. For the following reasons, we affirm in part and reverse in part.

On May 17, 1978, an MSHA inspector issued Citation Nos. 169705 and 169706 alleging violations of 30 CFR §56.17-1 in Capitol's cement plant. The standard provides:

> Mandatory.
>
> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

The question in this case is what constitutes "[i]llumination sufficient to provide safe working conditions." Resolution requires a factual determination

based on the working conditions in a cited area and the nature of illumination provided.

Citation No. 169705 alleged a violation of the standard because the lights over the coke storage bin and adjacent walkways were not operable. In concluding that the operator violated the standard, the judge was persuaded by the inspector's unrebutted testimony that the illumination was insufficient. In the absence of negligence, the judge assessed a $25 penalty. On remand, he saw "no reason to disturb [his] previous finding...." We conclude that substantial evidence supports the judge's findings.

The facts are undisputed. The only permanent lighting in a 30-40 foot area was provided by a mercury vapor light

which was not operable at the time of the inspection, about 9:00 p.m. 1/ Electrical outlets, extension cords, and auxiliary lighting were available, however, and workers were equipped with flashlights. There was little reflected light in this coke area. Because the coke storage bin continously supplied coke to the kiln, Capitol's employees might have to make repairs or do maintenance on the bin/kiln system at any time, including the evening shift. The lack of illumination created hazards, such as tripping

1/ This light failed because a photoelectric cell, which normally activated the lamp as the sun went down, malfunctioned. Although Capitol concedes the malfunction, it makes much of its lack of knowledge of the malfunction. Capitol's lack of knowledge relates only to its possible negligence. Because the judge found no negligence, Capitol's knowledge is not at issue here. Nor did we direct that issue for review.

or falling, for employees performing such work.

We reject Capitol's argument that, notwithstanding the failure of the permanent lighting, there was adequate illumination to ensure safe working conditions, because it also provided electrical outlets for portable lighting equipment and flashlights for night work. Portable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances. That is not the case before us, however.

Capitol states only that it provided such lighting and outlets; it does not indicate where such lighting was stored or how easy it was to reach. Although a

worker could carry a flashlight, extension cord, and auxiliary light in one hand, that practice may be neither safe nor desirable. Capitol concedes that a worker might have to climb a ladder to get to the top of the storage bin. It does not rebut the inspector's testimony that climbing a ladder and performing maintenance or repairs require the use of a worker's hands, and do not leave the hands free for carrying a flashlight or extension cord with auxiliary lights. Nor has Capitol established the adequacy of such portable lighting equipment; it does not show the amount of illumination this lighting would shed. Similarly, Capitol fails to prove that, under these facts, a flashlight provided sufficient illumination. The evidence and the case

law demonstrate otherwise. The inspector testified without contradiction that a flashlight would not provide sufficient light if an employee were simultaneously holding a flashlight and working on equipment. The case law indicates that a directed beam of light such as that supplied by a cap lamp--or, by analogy, a flashlight--may not shed sufficiently diffuse light to provide a safe work area. Clinchfield Coal Co. at 3, March 1979 FMSHRC, 1 MSHC 2027 (Chief Administrative Law Judge Broderick, March 12, 1979, aff'd. sub nom., Clinchfield Coal Co. v. Secretary of Labor, No. 79-1306, 1 MSHC 2337 (4th Cir. 1980) (unpublished). (Clinchfield involved the identical coal standard at 30 CFR §77.207).

In the absence of evidence to the contrary, we are persuaded that the judge properly credited the inspector's testimony that the lighting was inadequate. Clinchfield, supra; J. P. Burroughs and Son, Inc., 2 FMSHRC 3266, 3269, 1 MSHC 1165, 1166 (Chief Administrative Law Judge Broderick, 1980). We hold that, under these facts, the illumination provided by the operator did not satisfy the standard and we thus affirm the judge.

Citation No. 169706 alleged a violation of the standard because there was insufficient illumination in the area under the coke impact crusher, around the tail pulley of the C-58 conveyor belt, and by the tail section of the apron feeder under the coke hopper. The judge found that there were no lights

and concluded that Capitol had violated the standard "[i]nasmuch as miners might have to travel in the area at night." In our view, his finding that miners might have to work in the cited area at night is not supported by substantial evidence. Consequently, we reverse his finding of a violation and vacate the underlying citation.

There was undisputed testimony that, when work was performed in the area during daytime, there was adequate light. The judge impliedly found that the daytime lighting was adequate, and the Secretary does not argue otherwise. Although the inspector testified to his belief that emergency nighttime repairs might be necessary, he did not observe any employees there at night, nor did he testify as to the likelihood of such

nighttime repairs. By contrast, Capitol's witness testified that employees would not have to go into C-58 conveyor area at night because a bypass system provided sufficient fuel storage capacity so that the plant could run all night. Even if the bypass system failed at night, the plant had two addititonal days of fuel and other fuel systems available to substitute for the bypass system; hence any necessary repairs would not have to be made immediately.

Under these facts, we do not believe that substantial evidence supports the judge's finding that employees might have to work in the area at night. We hold that, because there was adequate light for safe working conditions during the day and there was no probability of

work being performed at night, there was no violation of the standard. Accordingly, we reverse the judge and vacate the citation. 2/

/s/ Richard V. Backley
Richard V. Backley, Chairman

/s/ Frank F. Jestrab
Frank F. Jestrab, Commissioner

/s/ A. E. Lawson, Commissioner
A. E. Lawson, Commissioner

/s/ Marian Pearlman Nease
Marian Pearlman Nease, Commissioner

2/ If even some sporadic nighttime work or the probability of nighttime work had been shown, the result might have been different.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4278

CAPITOL AGGREGATES, INC.,

Petitioner,

versus

FEDERAL MINE SAFETY & HEALTH
REVIEW COMMISSION and the SECRETARY
OF LABOR,

Respondents.

Petition for Review of an Order of
the Federal Mine Safety and Health
Review Commission

(March 19, 1982)

Before WISDOM, POLITZ and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21[1/].